IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.2824 OF 2005
IN
FIRST APPEAL (ST.)NO.13858 OF 2005

The Municipal Corpn. of Gr.Mumbai. ..Applicant.

V/s.

Smt.Prabhawati Harkkishindas Gehani
& Ors. ..Respondents.

Mr.A.Y.Sakhare, Sr.Advocate with Mr.Xavier for applicant B.M.C.

Mr.M.D.Angal for Respondent No.1, 2, 4 and 5.

Mr.Rajendra Gehani for respondent No.3.

CORAM: A.M.KHANWILKAR,J

DATE : JANUARY 17, 2006.

P.C. :

1. Heard Mr. Sakhare for the applicant and Mr. Angal for respondent No.1,2, 4 and 5. Mr.Gehani for respondent No.3.

2. This application is for condonation of delay in filing first appeal against the decision of the Small causes Court at Bombay dated 25th September, 2004 in Appeal No.61 of 1999. The applicants had applied for the certified copy of the impugned decision on 27th October, 2004. That application was admittedly, made beyond the period of limitation.

The certified copy was collected on 30th November, 2004, whereas the present application has been presented on 13th June, 2005. In the process, delay of 235 days has occurred as is computed by the registry of this court. In the application, the only explanation offered for such delay can be discerned from paragraph 5 which reads thus :

> "The Applicants further state that after obtaining the Certified Copy of the order dated 21.09.2004 on 30.11.2004, and after studying the entire case papers the concerned Dy. Law Officer took the orders from the Law Officer to go in Appeal. The Applicants further state that due to the above facts there is a delay in filing the present Appeal which is not intentional. The Applicants further submits that therefore there is a delay of almost 235 days in filing the present Appeal, which is unintentional and due to the facts and circumstances stated hereinabove."

3. The Respondent No.1 and 2 have filed reply opposing this delay application. Reply affidavit was filed on 29th October, 2005, but no rejoinder affidavit was filed much less any attempt made to offer proper explanation with regard to the delay in making application for obtaining certified copy and thereafter for the time taken for collecting the certified copy, till the filing of the present application.

4. In the reply affidavit, respondent Nos.1 and 2 have asserted that the provisions of section 5 of the Limitation Act are not applicable to the appeals under section 218D of the Bombay Municipal Corporation Act, 1888(hereinafter referred to as the Act of 1888). It is stated that the subject application for condonation of delay is, therefore, not maintainable. It is also asserted that the application for obtaining certified copy having been filed after the period of limitation, the appeal was barred. Further, the reply affidavit asserts that the applicant in the entire application has nowhere stated as to why the application for certified copy was not made within a period of one month and therefore, the prayer for condonation of delay should be rejected.

5. Let us first consider the argument as to whether the provisions of section 5 of the Limitation Act are applicable to the appeals filed under Section 218-D of the Act of 1888. That question will have to be addressed keeping in mind the Legislative history and the scheme of the relevant provisions of the said Act of 1888. It cannot be disputed that section 218-D of the Act was introduced for the first time by

amending Act 76 of 1948. The same reads thus :

> "218D. Appeals.-(1) An appeal shall lie to the High Court -
>
> (a) from any decision of the Chief Judge of the Small Cause Court in an appeal under Section 217 by which a rateable value in excess of two thousand rupees is fixed, and
>
> (b) from any other decision of the said Chief Judge in an appeal under the said section, upon a question of law or usage having the force of law or the constuction of a document.
>
> (2) The provisions of the Code of Civil Procedure, 1908, with respect to appeals from original decrees shall, so far as they can be made applicable, apply to appeals under sub-section (1) and orders passed therein by the High Court may on application to the said Chief Judge be executed by him as if they were decrees made by himself.
>
> Provided that no such appeal shall be heard by the High Court unless it is filed within one month from the date of the decision of the Chief Judge."

At the relevant time in 1948, the Indian Limitation Act 1908 was in force. By virtue of Section 29(2)(b) of the then Limitation Act, section 5 of the Limitation Act was inapplicable to the appeals such as the present one under Section 218D, for condoning the delay in filing appeal. The only other provision in the Act of 1888, for computing limitation in certain proceedings under the Act of 1888, that could be pressed into service at that time was section 523; which provides for the manner in which period of

limitation should be computed in certain proceedings under the Act of 1888. Section 523 of the Act provides thus :

> "523.Computation of time.-(1) In computing any limited time before or from or after any date or event which is appointed or allowed by or under this Act for the doing of any act or the taking of any proceeding, such time shall be taken as exclusive of the day of that date or of the happening of that event and as ending or commencing, as the case may be, at the end of the last preceding day, or the beginning of the next following day.
>
> (2) Where the limited time is to be computed from or after any date or even, the act or proceeding shall be done or taken at the latest on the last day of the limited time compunted as aforesaid, unless the last day is a Sunday or a public holiday or unless, in the case or a proceeding to be taken before the Chief Judge of the Small Causes Court, the said Court is closed on such last day in which events any act or proceeding shall be deemed to be done or taken in due time if it is done or taken on the next day after such Sunday, or after the close of such public holiday or on the first day when such Court reopens, as the case may be.
>
> (3) Where by this Act any act or proceeding is directed or allowed to be done or taken on a certain day and such day happens to be a Sunday or a public holiday, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day after such Sunday or after the close of such public holiday."

Sub-section (1) of Section 523 of the Act of 1888 corresponds to section 12(1) of the Limitation Act, 1963. Sub-section (2) of Section 523 corresponds to section 4 of the Limitation Act, 1963. In other

words, the scheme of Local law as it stood at the relevant time and in particular prior to the enactment of Limitation Act of 1963 was that section 5 of the Limitation Act could not be invoked in dealing with the prayer for condoning delay in filing appeal under section 218D of the Act of 1888. However, legislative change has been effected after 1963. In 1963 Indian Limitation Act, 1963 came into force. As per section 29(2) of the Limitation Act, 1963, the provisions of section 3 as well as 4 to 24 of the Act, 1963 have been made applicable uniformly to the proceedings such as appeals under section 218D of the Act of 1888, unless expressly excluded by the special or local law. It is not in dispute that after the Act of 1963, no amendment has been effected to the provisions of the Corporation Act, 1888-in particular Section 218-D or for that matter section 523; Nor any express provision has been introduced in the local law to exclude the application of section 5 of the Limitation Act, 1963 to the Appeals under Section 218D of the Local Act. If it is so, it would necessarily follow that provisions of section 5 of the Limitation Act 1963 would apply proprio vigore to the proceedings such as appeals instituted under section 218-D of the Corporation Act 1888 in terms of the provisions of the Limitation Act, 1963.

6. To get over this position counsel for the respondents, relying on the decision of the Apex Court in the case of **Union of India V/s. Popular Construction Co. reported in (2001)8 Supreme Court Cases 470**, would contend that from the scheme of the provisions of Act of 1888 it would appear that there is intention to exclude the provisions of the Limitation Act. Thus, argument of exclusion by necessary implication is advanced. That decision however, deals with the scope of Section 34 of the Arbitration and Conciliation Act, 1996. The Apex Court has went on to observe that provisions of Section 5 of the Limitation Act, 1963 are not applicable to an application challenging award under section 34 of the Arbitration and Conciliation Act of 1996. That view has been taken on consideration of section 34 of the Arbitration and Conciliation Act which expressly provides that period of limitation is three months and further period of 30 days can be extended on showing sufficient cause. Section 34 of the Arbitration Act employs expression "but not thereafter" which expression has been construed by the Apex Court to mean that it is express exclusion within the meaning of section 29(2) of the Limitation Act, thereby excludes the application of section 5 of

the Limitation Act. For taking that view the Apex Court has examined the Scheme and object of the Arbitration Act of 1996.

7. The question is: whether similar approach can be adopted in respect of Section 218D of the Corporation Act. Much emphasis was placed by the Respondents on the proviso to Section 218 D(2) of the Act. According to the Applicant, the language thereof would indicate that it amounts to express exclusion of application of section 5 of the Limitation Act. It is not possible to countenance this submission. Similar contention was considered by the Apex Court in the case of **Mangu Ram V/s.Municipal Corporation of Delhi AIR 1976 S.C.105**. The Apex court in paragraph-7 of the said reported decision has observed that "such language would be the language of every provision prescribing a period of limitation". Mere provision regarding period of limitation howsoever peremptory or imperative, is not sufficient to displace the applicability of Section 5. The Apex Court went on to observe that the conclusion is, therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal is filed after coming into force of the Limitation Act, 1963, Section 5 would be

available to the applicant; and inspite of sixty days prescribed in sub-section (4) of Section 417, the application would not be barred and despite the expiration of the time limit of sixty days, the High Court would have the power to entertain the appeal upon condoning the delay on showing sufficient cause. The principle underlying this decision would apply even to the case in hand. The provision of Section 218D, in my opinion, is only a provision regarding prescribing period of limitation. No more and no less. It is not possible to countenance that it is a provision so as to exclude the period which is extended by Section 5 of Limitation Act. As is noted earlier, the subject provision(S.218D) was introduced when the law of Limitation Act, 1908 was in force which itself excluded the application of section 5 of the Act at the relevant point. For that reason there was no necessity to have a provision to expressly exclude the application of section 5 of the Limitation Act. That requirement has however, become necessary after the commencement of Limitation Act, 1963. A priori, after 1963, if the local law has remained unaltered and no steps have been taken to expressly exclude the application of section 5 of the Limitation Act, it is incomprehensible to assume that section 5 of the Act of 1963 would still stand

excluded.

8. Section 523 of the Corporation Act however, provides for excluding certain period for the purpose of computation of time, which provision as mentioned earlier corresponds to Section 12(1) and Section 4 of the Limitation. Be that as it may, it is not possible to accept the argument that section 218D expressly excludes the application of Section 5 of the Limitation Act or it is possible to contend that it excludes that provision by necessary implication.

9. Counsel for the respondents would however, contend that principle stated in the decision of the Apex Court in **Union of India (Supra)** will have to be invoked in the present case. It is submitted that it is not necessary that there should be express provision in the Act. The exclusion can also be implied by construction of the provision which has the effect of express exclusion of the section 5 of the Act. As mentioned earlier, it is not possible to countenance this submission on the language of Section 218D or 523 of the Act of 1888 coupled with the legislative change brought about after Act of 1963.

10. The next contention canvassed on behalf of the respondents is that the applicants applied for the certified copy of the impugned decision after the period of limitation was over. It is submitted that in such a case the appeal as presented is unavailable. Reliance was placed on the decision of the Division Bench of our High Court reported in **AIR 1979 Bombay 33(J.K.Kapur Vs. M/s.Vachha & Co.)** which has taken a view that the period spent from the date of Judgment till the date of application while computing period of limitation shall not be excluded. In other words, time so spent will have to be reckoned for the purpose of computing limitation in filing an appeal. In this decision, it is observed that the object of explanation to section 12(2) of the Limitation Act seems clearly to be not to give premium to unmerited idleness and indifference of litigants in making application for copy. Application for copy of the impugned decree is to facilitate filing of the appeal. This decision of the Division Bench refers to the observation of the Apex Court in the case of **Udayan Chinubhai Vs. R.C.Bali reported in AIR 1977 S.C. 2319.** In this decision, the Apex Court was called upon to consider the question whether under section 12(2) of the Limitation Act, 1963 read with explanation, the

appellant therein was entitled to exclude the time commencing from the date of the Judgment till signing of the decree prior to his application for copy thereof. In that case, the trial Court had decreed the suit by Judgment dated March 27, 1976 which required the plaintiff to deposit court fee. The plaintiff filed application for certified copy of the Judgment on April 17, 1976. As certified copy was not made available for quite some time, the plaintiff was advised to apply afresh on July 14, 1976. Thereafter, the plaintiff moved the matter before the High Court by appeal. The High Court Registry raised objection that the appeal was time barred. Whereafter, the plaintiff moved application for condonation of delay in presenting the appeal. According to the plaintiff, there was no delay whatsoever. In the fact situation of that case, the High Court considered the said application and found that the appeal was time barred. The High court refused to condone the delay of 12 days, which according to it was properly explained. In this backdrop, the question was posed before the apex court as referred to above. While considering the said question, the Apex Court has made observation in paragraph 24 that explanation to section 12(2) of the limitation Act postulates that time taken by the

court to prepare the decree before an application for a copy thereof is made shall not be excluded. In paragraph-25, the Apex court reiterated this position that the scope of section 12(2) read with explanation would indicate that the time that has elapsed from the pronouncement of the judgment to the point of time prior to application for a copy of the decree shall not be excluded in computation the time requisite for obtaining copy. It is then observed that it is in accord with reason and sound common sense, since a person does nothing in court for obtaining a copy prior to his making an application for a copy when there is nothing, in his way, not to. In paragraph 26, 27 and 32 similar observation has been made. The Court stated the legal position with reference to the scope of Section 12(2) read with the Explanation of the Limitation Act that a person cannot get exclusion of the period that elapsed between pronouncement of the judgment and the signing of the decree if he made the application for a copy only after preparation of the decree. Counsel for the applicant however, has relied on the recent decision of the Apex Court in the case of **M/s.India House Vs. K.N.Lalwani reported in AIR 2003 Supreme Court 2084**. Even in this case as in the present one, the applicant applied for the Certified copy of the

impugned order after the period of limitation provided by the Act was over. This matter arose under the provisions of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The Section 25 of the said Act required the revision to be filed within 30 days from the date of the order impugned. The order in that case was passed on 25th September, 2001 which was impugned in the revision application. Application for certified copy was however, made only on 9th November, 2001. The Certified copy was delivered on 24th December, 2001 and the revision application came to be filed before the High court on 2nd January, 2002. In this backdrop, the Apex Court went on to consider whether the revision application which was filed was barred by limitation and the delay so occurred can be condoned in exercise of powers under section 5 of the Limitation Act. The Apex Court after considering the relevant decisions concluded in paragraph 6 of the reported Judgment that all that subsection (2) of section 12 of the Limitation Act says is the time requisite for obtaining the certified copy is excluded for computing the period of limitation; in other words, the time requisite for obtaining the copy being added to the prescribed period of limitation and treating the result of addition as the period prescribed.

What is relevant to note is that, it is then observed that in adopting this methodology it does not make any difference whether the application for certified copy was made within the prescribed period of limitation or beyond the limitation. It is further observed that neither it is so provided in sub-section(2) of Section 12 of the Limitation Act nor in principle it is possible to accept such a view. In paragraph-7 of the decision, the Apex Court observed that if the court were to accept any other submission, yet another consequence would follow-that Section 5 of the Limitation Act or the power to condone delay by reference to proviso appended to Section 25(2) of the Act shall be exercisable for a period subsequent to the obtaining of the certified copy of the impugned order but not to the period before it. Such is not the prohibition contained in any of the said provisions. It is then observed that in the facts and circumstances of a given case, the court may be called upon to exercise its discretionary power to condone the delay occasioned by the time lost either before applying for certified copy or after the delivery thereof. In paragraph-8 of this decision, the Court has then adverted to the Full Bench Decision of our High Court in the case of **Murlidhar Shrinivas vs. Motilal Ramcoomar, AIR 1937**

Bombay 162, wherein it was held that the court cannot impose upon statutory right of an appellant a restriction not warranted by the Act and a rule providing that no time shall be allowed for obtaining a copy of the decree unless such copy be applied for within specified days from the date of the decree, would be ultra vires. It is then observed that in computing the time for appeal from a decree it is legitimate (in a proper case) to exclude the period requisite for obtaining a copy of the decree even when no application for such copy was made till after the expiration of the time for appeal. The Apex Court then adverted to a Full Bench decision of the Madras High Court(citation is not found in the reported decision), which has held that though the application for certified copy of judgment and decree was made after prescribed period of limitation, the period was liable to be excluded in all cases depending on whether sufficient cause was shown or not. This view of the Full Bench of the Bombay High Court as well as Madras High Court has been approved. Suffice it to observe that, the decision of Apex Court which is pressed into service on behalf of the applicant in the case of **India House(Supra)**, is the direct decision on the point; and applying the ratio of the said decision I have no hesitation in taking

the view that it is open to this court to consider the delay application preferred by the applicant and examine whether sufficient cause has been made out so as to excuse the delay as has occassioned, in exercise of powers under section 5 of the Limitation Act.

11. Indeed, the counsel for the parties relied on other decisions, but to avoid prolixity and for the view I have taken, it is not necessary to advert to each of those decisions. That brings us to the question whether the applicant has made out sufficient cause for condoning the delay of 235 days and the same is inexorable. After perusing the pleadings I have no hesitation in taking the view that "no explanation at all" has been offered by the applicant as to what prevented the applicant "from filing the application for obtaining certified copy of the impugned order within the period of limitation". In the present case, the impugned order was passed on 21st September, 2004. Whereas, the application for obtaining certified copy of the Judgment and decree was filed on 27th October, 2004, which is admittedly beyond the period of limitation. The only explanation that has been offered for condoning delay is, as can be discerned from the

paragraph-5 of the application which is reproduced earlier. No explanation at all has been offered as to why the application for obtaining certified copy was not filed within the period of limitation, instead on 27th October, 2004.

12. Moreover, even after the certified copy was ready and collected in October, 2004, there is no satisfactory explanation for taking long time to file this application till 13th June, 2004. The only explanation offered in the paragraph-5 of the application is that after studying the entire case papers the concerned Dy. Law Officer took the orders from the Law Officer to go in Appeal. It is then stated that due to the above facts delay of 235 days has occurred which is unintentional one. No other details are mentioned in the application. Such explanation offered by no stretch of imagination can be said to be any explanation much less sufficient cause so as to condone the delay of 235 days.

13. The counsel for the applicant would however, rely on the decision of the Apex Court in the case of **State of Haryana Vs.Chandra Mani, (AIR 1996 S.C.1623)** wherein the Apex court has observed that the court should take liberal view in so far as the application

for condonation of delay filed on behalf of the Government department or public authority is concerned. This is so because the Government is an impersonal machinery and decisions are taken at slow pace and on refusing to condone such delay effect is on the public interest. Reliance is also placed on another decision of the Apex Court in the case of **Special Tehsildar, Land Acquisition, Kerala Vs. K.V. Ayisumma AIR 1996 S.C.2750,** which has reiterated the above legal position stated in the **State of Haryana (Supra).** Indeed, there is no difficulty in accepting the submission that the court should take a lenient attitude in so far as the application for condonation of delay filed on behalf of the State or Public Authorities. However, in the present case, as mentioned earlier, "no explanation at all" has been offered with regard to what prevented the applicants from making application for obtaining certified copy within limitation period. Similar situation was considered by the Division Bench of our High Court in the case which is pressed into service on behalf of the respondent in the case of **J.K. Kapur(supra).** The Division Bench rejected the application preferred by the appellant in the said case. I am conscious of the fact that in that matter the appellant was a private party and not government body or corporation

as in the present case. Nonetheless, even if it were to be State or Public authority or statutory body, it is only when some explanation is offered, the court can be called upon to take a lenient view of the matter. However, if "no explanation at all" is offered, the application, as in the present case, will have to face the consequence of rejection on that ground. This is so because the application without any explanation at all will be no application in the eye of Law; for it being bereft of jurisdictional facts. Thus understood, exercising powers under section 5 of the Limitation Act in such a case will be jurisdictional error. In the present case, the application is devoid of any information or explanation even in regard to the period posterior to obtaining certified copy till the filing of this application, which is also unusually long. Moreover, even when the respondents filed reply affidavit which was served on the applicant as back as in October, 2005, taking specific stand that no explanation at all has been offered, no attempt has been made by the applicant to file rejoinder, and bring on record relevant jurisdictional facts. It needs to be mentioned that today by separate order, in the case of this very applicant, I have allowed other applications where explanation was offered.

14. Accordingly, this application deserves to be dismissed. Ordered accordingly.